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No. 17-532

In The Supreme Court of the United States

CLAYVIN HERRERA,

Petitioner,

v.

STATE OF WYOMING,

Respondent.

On Petition For A Writ Of Certiorari To The District Court Of Wyoming, Sheridan County

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1995, the United States Court of Appeals for the Tenth Circuit held that the Act admitting Wyoming into the Union, the occupation of the Bighorn National Forest, and the need to regulate elk harvest to conserve the species precluded members of the Crow Tribe from hunting in Wyoming without complying with Wyoming's hunting regulations. *Crow Tribe of Indians v. Repsis*, 73 F.3d 982, 992 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (No. 95-1560). Petitioner Clayvin Herrera killed elk in violation of Wyoming's game laws in 2014. During his misdemeanor prosecution in the state circuit court, that court held Herrera could not assert the Crow Tribe's expired Treaty hunting right as a defense. On appeal to the state district court, that court held that the Tenth Circuit's final decision against the Crow Tribe collaterally estopped Herrera from asserting tribal hunting rights as a defense to his prosecution.

The question presented is:

Whether the doctrine of collateral estoppel precludes Herrera from relitigating the Crow Tribe's hunting rights within Wyoming.

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INTRODUCTION

In 1996, this Court denied the Crow Tribe's petition for a writ of certiorari on the exact treaty hunting issue presented in this case. *See Crow Tribe of Indians v. Repsis*, 73 F.3d 982 (10th Cir. 1995), *cert. denied*, 517 U.S. 1221 (1996) (No. 95-1560). Twenty-two years later, Petitioner Clayvin Herrera asks this Court to review the Tenth Circuit's interpretation of the 1868 Treaty with the Crows, 15 Stat. 649 (1868).

Although a final judgment bars his request, Herrera asks this Court to ignore the procedural bar of collateral estoppel and reinterpret the Treaty. Pet. 15. But collateral estoppel is a threshold issue that this Court considers first, it is the only issue ripe for review, and it does not meet this Court's criteria for certiorari.

Herrera suggests that the final decision reached twenty-two years ago need not prevent this Court from reinterpreting the Treaty. Pet. 15. But the content of the Treaty does not dictate whether the state district court should have reached the decision it did: precluding Herrera from relitigating the continuing validity of the Crow Tribe's hunting rights within Wyoming. Instead, the Court merely must consider whether *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), changed the legal context in which *Repsis* was decided. The state district court properly concluded that it did not.

Before this Court reinterprets the Treaty, it must conclude that Herrera is not estopped from relitigating the Crow Tribe's hunting right. Herrera has not even

presented this question for review by this Court. Moreover, because of this procedural obstacle, this Court lacks the record it seeks in a case such as this. When it interprets an Indian treaty, this Court examines the written words in light of the treaty's history, negotiations, and the practical construction adopted by the parties. *See, e.g.*, *Mille Lacs*, 526 U.S. at 196 (citations omitted). The circuit court that tried the misdemeanor charge did not allow the parties to submit such evidence after Herrera sought a ruling as a matter of law. That court also did not allow the parties to submit evidence on whether the Bighorn National Forest is occupied or whether Wyoming's regulations are reasonable and necessary for conservation. Accordingly, the record here is ill-suited for this Court to resolve the question posed by Herrera's petition, even if it was ripe for resolution.

This case presents no error in need of correction, no split of authority in need of reconciliation, and no issue of overriding public importance in need of resolution. The hunting rights of the Crow Tribe and its members in Wyoming have been settled by the federal courts for almost a quarter of a century. Nor does this case provide a clean vehicle to revive a previously-adjudicated and long-terminated hunting right, because the record in this case related to the Treaty is nonexistent. This Court should deny Herrera's petition.

STATEMENT OF THE CASE

I. Legal Background

On May 7, 1868, the Crow Tribe and the United States agreed to the Treaty with the Crows. *See* 15 Stat. 649 (1868). Article 4 of the Treaty provides, in relevant part: "they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Id.* Two months later, the United States, the Eastern Band of Shoshone, and the Bannock Tribe of Indians agreed to identical language in the Fort Bridger Treaty. *See* 15 Stat. 673 (1869).

Wyoming entered the Union in 1890, and shortly thereafter, Race Horse, a member of the Bannock Tribe of Indians, claimed he had the right to hunt on the unoccupied lands of the United States in Wyoming under the Fort Bridger Treaty of 1869. *Ward v. Race Horse*, 163 U.S. 504, 507 (1896). The Court disagreed and held that the Bannock Tribe's hunting right was extinguished in Wyoming. *Id.* at 515-16. The Court's opinion discussed the hunting districts referenced in the Treaty, and determined that the terms of the Treaty did not authorize the continued enjoyment of the right to kill game because the Wyoming territory ceased to be part of the hunting districts and had come within the authority and jurisdiction of the State of Wyoming. *Id.* at 509. The Court determined that the Treaty hunting right was incompatible with the Act admitting Wyoming into the Union under the equal footing doctrine.

Id. at 514. The Court also recognized that Congress had the power to create rights during the existence of a territory "which are of such a nature as to imply their perpetuity." *Id.* at 515. But, interpreting the specific language and context of the Fort Bridger Treaty, the Court held the Bannock's treaty hunting right was "temporary and precarious," "essentially perishable, and intended to be of a limited duration" such that it was not intended to survive statehood. *Id.* at 510-15.

Nearly one hundred years later, the Crow Tribe challenged Wyoming's enforcement of its game laws against a tribal member, claiming the Tribe retained the right to hunt in the unoccupied lands of the United States, including the Bighorn National Forest. *Repsis*, 73 F.3d at 986. In support of its claim, the Tribe argued this Court had overruled, repudiated, and disclaimed each of the legal doctrines applied in *Race Horse*, including the equal footing doctrine. *Id.* at 988. The Tribe asserted that the equal footing doctrine was a "major premise" of the Court's decision in *Race Horse*. *Id.* at 990. The Tenth Circuit disagreed. It noted that the equal footing doctrine "does not prevent the United States from creating a right in a territory which would be binding on the state upon its admission into the Union." *Id.* at 991. And, "[i]n *Race Horse*, the Court was fully aware of Congress' power to create binding continuing rights." *Id.* But Congress did not convey a perpetual right in the Fort Bridger Treaty. *Id.* at 992. Instead "the privilege given was temporary and precarious." *Id.*

The Tenth Circuit noted that the language in the Fort Bridger Treaty at issue in *Race Horse* was identical to the language contained in Article 4 of the Treaty with the Crows. *Id.* at 987. It also noted *Race Horse*'s careful historical analysis, and that this Court had concluded that the Fort Bridger Treaty of 1869 clearly contemplated the disappearance of the conditions specified in the Treaty, so that particular hunting right was temporary and precarious in nature, and intended to be of limited duration. *Id.* at 988-89 (citing *Race Horse*, 163 U.S. at 510).

Relying on *Race Horse*, the Tenth Circuit concluded that the hunting right conveyed in the Treaty with the Crows similarly terminated upon Wyoming's admission to the Union. *Repsis*, 73 F.3d at 992. The right terminated upon statehood because the right was intended by Congress to be temporary rather than perpetual, not because the right was repealed by implication under the equal footing doctrine. *Id.*

The Tenth Circuit provided two alternative grounds for its decision that the Crow Tribe could not hunt in the Bighorn National Forest without adhering to Wyoming's game laws. It determined that the creation of the Bighorn National Forest resulted in "occupation" of the land. *Repsis*, 73 F.3d at 993. Therefore, the Tribe could not exercise the right in that forest. *Id.* It also found that "states may regulate off-reservation treaty rights 'in the interest of conservation, provided the regulation meets appropriate standards, and does not discriminate against the Indians.'" *Id.* at 992 (quoting *Puyallup Tribe v. Dep't of Game of Wash.*, 391

U.S. 392, 398 (1968)) (*Puyallup I*). Such state conservation regulations must be reasonable and necessary for conservation. *Id.* (citing *Dep't of Game of Wash. v. Puyallup Tribe*, 414 U.S. 44, 45 (1973) (*Puyallup II*) and *Puyallup Tribe, Inc. v. Dep't of Game of Wash.*, 433 U.S. 165, 175 (1977) (*Puyallup III*)). The Tenth Circuit found that even if the Crow Tribe's hunting right survived Wyoming's statehood, ample evidence in the record demonstrated that Wyoming's regulations governing elk hunting were reasonable and necessary for conservation. *Id.* at 992-93.

Following *Repsis*, this Court considered its earlier decision in *Race Horse*. In 1999, the Court determined that the Mille Lacs Band of Chippewa Indians' 1837 treaty right to hunt, fish, and gather wild rice was not abrogated by implication upon Minnesota's admission to the Union. *Mille Lacs*, 526 U.S. at 208. Unlike *Repsis*, which did not consider the equal footing doctrine to be a major premise of *Race Horse*, *Mille Lacs* described the doctrine as "the first part" of the holding in *Race Horse*. *Id.* at 203. The distinction is of little consequence, however, because both *Mille Lacs* and *Repsis* acknowledged that the equal footing doctrine had been rejected as a means to terminate Indian treaty rights at least as early as 1905. *Compare id.* at 226 n.7 (citing *United States v. Winans*, 198 U.S. 371, 382-84 (1905)) *with Repsis*, 73 F.3d at 991 (also citing *Winans*).

As the *Repsis* court had decided earlier, this Court expressly approved in *Mille Lacs* what it described as the alternative holding of *Race Horse*: Congress did not intend the language "the right to hunt on the

unoccupied lands of the United States" to survive Wyoming's statehood. *Mille Lacs*, 526 U.S. at 206. Thus, *Mille Lacs* reaffirmed that the proper inquiry is whether Congress intended treaty rights to be perpetual or to expire upon the happening of a clearly contemplated event, such as statehood. *Id.* at 206-07. Based on the treaty language and history of the right at issue in *Mille Lacs*, the Court concluded that Congress did not intend that those specific rights to hunt, fish, and gather wild rice would expire upon the happening of a clearly contemplated event, such as statehood, as Minnesota argued. *Id.* at 207-08.

In sum, *Mille Lacs*, *Repsis*, and *Race Horse* applied the same legal test, but came to different conclusions based on particular facts about each treaty.

II. Factual Background

In January 2014, nineteen years after this Court denied the Crow Tribe's petition for certiorari in *Repsis*, Herrera and other members of the Crow Tribe left the Crow Indian Reservation, crossed a fence, and entered the Bighorn National Forest in Wyoming. Pet. App. 5. The area was closed to elk hunting under Wyoming law. *Id.* Herrera shot a trophy bull elk, took the head with antlers, and left the headless carcass in Wyoming. April 27, 2016 Tr. Trans. at 3:30:55, 4:03:05,

5:30:43, 5:37:43.[1] At trial, Herrera testified that he removed some meat from the animal.[2]

After the January 2014 hunt, Herrera, who is a Game Warden for the Crow Tribe, approached the Wyoming Game and Fish Department to discuss mutual law enforcement issues along the shared border of the reservation and Wyoming. *Id.* at 3:20:19. He offered to "help in any way we can to catch violators near our mutual borders." *Id.* at 3:21:29. Wyoming Game Warden Dustin Shorma responded to Herrera's request. *Id.* The two Wardens met to discuss mutual poaching issues. *Id.* Herrera inquired about work performed by the Wyoming Game and Fish Department forensic laboratory. *Id.* at 3:26:11. During the meeting, Warden Shorma became suspicious of Herrera's intentions. *Id.* at 3:29:58.

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[1] "Tr. Trans." refers to the trial proceedings in the state circuit court. The trial proceedings are contained on audio files.

[2] Herrera claims "members of the Tribe . . . depend upon their treaty-protected hunting rights to feed their families to this day[;]" "[b]etween 1868 and 1995, members of the Crow Tribe continuously hunted in the Bighorn National Forest, almost entirely free of state interference[;]" and "[i]t is undisputed that the federal government allows year-round treaty hunting in the national forests." Pet. 3, 7, 9. These statements are not supported by any evidence admitted by the trial court, and they are inaccurate. As the State noted below, effective in 1908, Congress directed federal employees to "aid in the enforcement of the laws of the State or Territory in which said forest reservation is situated, in relation to the protection of fish and game[.]" 30 Stat. 1095. Wyoming has enforced its conservation laws in the Bighorn National Forest with federal cooperation since at least 1908. Wyoming produced its early game laws dating back to that time, and asked the court below to take judicial notice. Oct. 13. 2016 Br. of Appellee at 21-23.

Shorma believed Herrera was seeking information about ongoing Wyoming poaching investigations involving specific members of the Tribe. *Id.* at 3:26:30.

Warden Shorma returned from the meeting and performed a Google search on Herrera. *Id.* at 3:30:33. He found pictures of Herrera posing with a trophy elk in an area Warden Shorma believed to be in Wyoming, not on the Crow Indian Reservation. *Id.* at 3:30:55. The title of the online post was "Good Year on the Crow Reservation." *Id.* at 3:37:05. Suspecting the animal had been killed in Wyoming, Warden Shorma began his investigation of the incident at issue here. *Id.* at 3:58:19.

In the summer of 2014, Warden Shorma located the carcass from the elk Herrera shot, along with two other elk carcasses in the Bighorn National Forest in Wyoming. *Id.* at 4:03:05. DNA testing established one carcass matched an elk head seized from Herrera. *Id.* at 5:49:50.

III. Course of Proceedings

In September 2014, Warden Shorma cited Herrera with two misdemeanors: taking an antlered big game animal without a license or during a closed season; and accessory to taking an antlered big game animal without a license or during a closed season. Pet. App. 5. Wyoming brought misdemeanor charges against Herrera in the state circuit court. *Id.*

On July 2, 2015, Herrera filed a motion to dismiss the charges, arguing he was a Crow Tribal member and

enjoyed absolute immunity to hunt the "unoccupied lands of the United States" under Article 4 of the Treaty with the Crows, regardless of state regulation. Pet. App. 6. The State responded that, under the Tenth Circuit's decision in *Repsis*, *Race Horse*, and *Mille Lacs*, the Crow's treaty hunting right had expired. R. 767, 773-92. The State also asserted that the Bighorn National Forest was not "unoccupied land of the United States." R. 768, 793-802. Finally, the State contended that closed seasons are necessary for the conservation of the species, so Herrera was not immune from prosecution even if a Treaty right persists. R. 823-44, 970-79.

The State requested an evidentiary hearing to introduce indicia of occupation of the Bighorn National Forest, to establish that closed seasons are reasonable and necessary to conserve the species, and to aid in the interpretation of the Treaty. Pet. App. 6; R. 764-66, 805-06. The State also filed a motion in limine asking the court to prohibit Herrera from raising the Treaty at trial if the court denied Herrera's motion to dismiss. Pet. App. 6.

The circuit court scheduled evidentiary hearings, and the parties briefed the issues. Pet. App. 6-7. Herrera asserted that evidentiary hearings were unnecessary, and he requested that the court decline to receive evidence and to rule in his favor on all issues as a matter of law. *Id.* 7.

On October 16, 2015, the circuit court denied Herrera's motion to dismiss, and canceled its

scheduled evidentiary hearings. Pet. App. 36, 43. It concluded as a matter of law that Herrera did not have an off-reservation Treaty hunting right in the Bighorn National Forest. *Id.* 41-43. The circuit court found the off-reservation Treaty hunting right asserted by Herrera was "indistinguishable" from the Treaty issue adjudicated in *Repsis*. *Id.* 37. It noted that the Court in *Repsis* found the right to be extinguished because the Crow Tribe's Treaty hunting right was temporary and because the Bighorn National Forest is "occupied" within the meaning of the Treaty. *Id.* 38-39. While acknowledging that *Mille Lacs* rejected the equal footing doctrine as a basis to terminate off-reservation treaty hunting rights by implication at statehood, the circuit court found that Herrera mischaracterized *Mille Lacs* when he said it repudiated *Race Horse*. *Id.* 39.

The circuit court also recognized that even if the Treaty right persisted, Wyoming may regulate that right so long as the regulation is necessary for conservation. Pet. App. 39-40. On this point, the circuit court held that Wyoming's elk hunting seasons were nondiscriminatory, reasonable, and necessary for conservation and, therefore, enforceable against Herrera even if his treaty right still existed. *Id.* 41-42. It then granted the State's motion in limine to prohibit Herrera from discussing the Treaty at trial. *Id.* 43.

Herrera immediately filed petitions with the Wyoming Supreme Court for a writ of review, a writ of certiorari, and a writ of prohibition, all of which were denied. Herrera next filed a notice of appeal to the district court, which dismissed the interlocutory appeal

for lack of jurisdiction. Herrera then asked the circuit court to reconsider the State's motion in limine, but that motion was denied as well. Finally, Herrera unsuccessfully sought emergency orders to stay trial from the circuit court, the Wyoming Supreme Court, and this Court. Pet. App. 8.

Herrera went to trial on April 27 through 29, 2016. Under oath, he admitted his role in killing three elk. Pet. App. 9. However, he repeatedly denied he was in Wyoming when he acted, but rather testified he was on the Crow Reservation. Herrera said that if he had been in Wyoming when he acted, it would be a "violation." April 28, 2016 Tr. Trans. at 2:53:25-2:53:35; 3:20:25-3:25:05; R. 1427. At one point in the trial, he marked the spot where he shot the elk on a State exhibit. R. 1451. That spot is within Wyoming, but Herrera claimed it was Crow land. April 28, 2016 Tr. Trans. at 3:06:37-3:07:23; R. 1429-51. The jury convicted Herrera on both counts. Pet. App. 9. The state circuit court sentenced him to an $8,080 fine, a one-year suspended jail sentence, and suspended his access to Wyoming hunting privileges for three years. *Id.*; R. 1468-69. His direct appeal to the state district court followed. R. 1481-94.

At oral argument, the district court expressed concern that Herrera was attempting to relitigate the issue decided in *Repsis*. Pet. App. 10. It questioned whether collateral estoppel barred Herrera's assertion of the treaty defense, and ordered supplemental briefing on the issue. *Id.* Following the submission of supplemental briefs, the district court affirmed the circuit

court on multiple grounds, relying primarily on the doctrine of collateral estoppel. *Id.* 31.

In an unpublished opinion, the state district court conducted an exhaustive analysis of the doctrine and its applicability to this case. Pet. App. 10-31. It determined that the issue raised by Herrera was identical to the issue fully litigated by the Crow Tribe in *Repsis*. *Id.* 13-14. The court determined that all elements of collateral estoppel were met. *Id.* 13-18. Herrera does not challenge this determination by the district court in his petition to this Court.

The state district court also considered and dismissed all notable exceptions to collateral estoppel, including whether *Mille Lacs* changed the applicable legal context. Pet. App. 19-26. The district court concluded that *Mille Lacs* did not overturn *Race Horse* or *Repsis*. *Id.* 24. The district court determined *Mille Lacs* did not change the fundamental legal principle at issue, because *Mille Lacs* did not reject the temporary and precarious doctrine. Rather, *Mille Lacs* clarified that the focus of the *Race Horse* inquiry is whether Congress intended the rights to survive statehood. *Id.* 23 (citing *Mille Lacs*, 526 U.S. at 207). Accordingly, because *Repsis* and *Mille Lacs* are consistent, the district court concluded that *Mille Lacs* did not change the applicable legal context. *Id.* 24. Because no exception applied, Herrera was properly estopped from relitigating the validity of the hunting right. *Id.* 31.

The state district court also set forth as an independent alternative basis for affirmance that the state

circuit court properly adopted the reasoning of *Repsis*. Thus, regardless of whether collateral estoppel precluded the defense, the circuit court affirmatively and correctly determined that the right had expired and provided no defense to the criminal prosecution. Pet. App. 31-33. Moreover, the district court found that the circuit court had properly concluded, consistent with the Tenth Circuit's analysis in *Repsis*, that the Bighorn National Forest is occupied as a matter of law within the meaning of the Treaty. *Id.* 21-22.

After his conviction, Herrera petitioned the Wyoming Supreme Court for a writ of certiorari, which the court denied. Pet. App. 1-2. He now brings the instant petition requesting a writ of certiorari to the state district court.

REASONS TO DENY THE PETITION

I. Petitioner seeks to avoid the application of collateral estoppel by framing the Question Presented as one of treaty interpretation, but collateral estoppel is a threshold issue that must be decided before the Court can interpret the Treaty.

Collateral estoppel or issue preclusion "bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and . . . is essential to the judgment." *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (citing Restatement (Second) of Judgments § 27 (1980)). Even when the

core requirements of the doctrine are met, the Court may decline to apply the doctrine if there has been a change in the applicable legal context. *Id.* (citing Restatement (Second) of Judgments § 28, cmt. c (1980)).

Whether the off-reservation Treaty hunting right persists is the same issue the Crow Tribe raised in *Repsis*. Pet. App. 13. In fact, in his Petition, Herrera does not contest the state district court's determination that all elements of collateral estoppel were present. Instead, Herrera's sole argument is that *Mille Lacs* "undoubtedly" "changed the legal context," thereby allowing him to relitigate the Treaty issue and collaterally attack the judgment of the Tenth Circuit in *Repsis*. *See* Pet. 15. That argument does not square with the actual holding of *Mille Lacs*, because in that case, this Court specifically approved the alternative holding of *Race Horse*. *Mille Lacs*, 526 U.S. at 206-07. Building on this faulty premise, Herrera asserts the issue for review is "clean" and that the Court's decision "will answer whether there was a change in the applicable legal context." Pet. 15.

This approach has significant problems. It ignores the threshold issue underpinning the state district court's principal holding and invites this Court to interpret the Treaty without the benefit of a fully developed record. This approach contravenes the very reasons why the Court adheres to the doctrine – to give finality to judgments, to prevent the legal harassment of litigants, to prevent the abuse of judicial resources, and to minimize potential of inconsistent decisions. *See, e.g.*, *Baldwin v. Iowa State Traveling Men's Assoc.*,

283 U.S. 522, 525 (1931) ("Public policy dictates that there be an end of litigation that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled[.]"); *see also Montana v. United States*, 440 U.S. 147, 153-54 (1979) (application of res judicata and collateral estoppel is necessary to conclusively resolve disputes, to protect litigants from vexatious litigation, to conserve judicial resources, and to foster reliance on judicial action by minimizing the possibility of inconsistent decisions). Like res judicata, collateral estoppel "is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts[.]" *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917)). This Court should decline Herrera's invitation to disregard the doctrine.

In his petition, Herrera offers no good reason why this Court should ignore the policies that have led it to apply the doctrine of collateral estoppel. Courts should, and do, routinely consider the preclusive doctrines before deciding issues on the merits. *See, e.g.*, *Cooper v. Harris*, 581 U.S. ___ (2017) ("We address at the outset North Carolina's contention that a victory it won in a very similar state-court lawsuit should dictate (or at least influence) our disposition of this case."). That is exactly what the state district court did in this case, when it honored the preclusive effect of the Tenth Circuit's decision in *Repsis*. Pet. App. 11-26.

Herrera also contends the alternative holding in *Repsis* – that the establishment of the Bighorn National Forest occupied the forest – does not collaterally estop further litigation of that issue because it was not essential to the judgment.[3] Pet. 32 n.12. This is incorrect. The general rule provides: "an alternative ground upon which a decision is based should be regarded as 'necessary' for purposes of determining whether [a party] is precluded by the principles of res judicata or collateral estoppel from relitigating in a subsequent lawsuit any of those alternative grounds." *Magnus Elecs., Inc. v. La Republica Argentina*, 830 F.2d 1396, 1402 (7th Cir. 1987).[4] As the state district court noted,

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[3] Herrera also argues agreements from 1891 and 1904, and the Forest Reserve Act contain savings clauses that state Indian treaty rights are not changed, repealed, or modified as a result of those agreements and Act. Pet. at 23. He bases this argument upon a fallacy. Wyoming became a state in 1890. If the hunting right terminated at Wyoming's statehood, as *Mille Lacs* confirmed, then agreements and Acts passed subsequent to statehood with savings clauses stating they did not change, repeal, or modify treaties do nothing to aid in determining what those rights were at the time. Regardless, as the state district court noted, the *Repsis* court knew of these agreements and Acts. Pet. App. 13. Herrera also claims the creation of the forest is akin to *Mille Lacs* where this Court determined executive action cannot cancel treaty rights not abrogated by Congress. But Congress cured any executive action problem when it suspended the 1897 proclamations and re-enacted them. 30 Stat. 34.

[4] As *National Satellite Sports v. Eliadis, Inc.*, 253 F.3d 900 (6th Cir. 2001) noted, there is a split of authority on the issue as to whether a litigant must be estopped from relitigating alternative grounds in a subsequent lawsuit. But as this Court has stated, "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, the ruling on neither is *obiter*, but each is the judgment of the court and of

Repsis had two alternative holdings: the forest is occupied within the meaning of the treaty, and the record contains ample evidence to support a finding that the regulations were reasonable and necessary for conservation even if the hunting right persists. Pet. App. 21-22. Herrera should be estopped from relitigating these issues as well as the Treaty issue he presents.

And even if the Tenth Circuit wrongly decided *Repsis* in 1995, its conclusions should not be upset. As the state district court noted, estoppel applies when a fact, question, or right has been adjudicated in a previous action, "even though the determination was reached upon an erroneous view or by an erroneous application of the law." Pet. App. 25-26 (citing *United States v. Moser*, 266 U.S. 236, 242 (1924)). The Tenth Circuit adjudicated the exact Treaty hunting right at issue here, and the Crow Tribe itself was a party. Thus, even if Herrera were correct that in light of *Mille Lacs*, *Repsis* was wrongly decided, this specific right has been adjudicated and is final under the general rule announced by the Court in *Moser*. The Crow Tribe and its members cannot litigate the same legal issue in perpetuity.

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equal validity with the other." *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 485-86 (1924) (internal citations omitted). In any event, Herrera has not presented this question to this Court for review, and the issue is distinct from whether, if Herrera could prevail on the treaty interpretation issue, one or both of the alternative holdings of *Repsis* would become a primary holding.

II. Collateral estoppel is appropriate because this Court's decision in *Mille Lacs* did not overrule the earlier decision by this Court specifically interpreting Indian treaty rights in Wyoming.

In an attempt to avoid collateral estoppel, Herrera claims an exception to estoppel applies because *Mille Lacs* "undoubtedly changed the applicable legal context." Pet. 15. To the contrary, the law remains the same after *Mille Lacs*, so he cannot evade the doctrine.

For a change in law to overcome the effect of collateral estoppel, three elements must be met: (1) the basic law must have been altered; (2) the decision sought to be reopened must have applied old law; and (3) the change in law must compel a different result under the facts of the case. *Dow Chem. Co. v. Nova Chem. Corp. (Canada)*, 803 F.3d 620, 628-30 (Fed. Cir. 2015), *cert. denied*, 136 S. Ct. 2452 (2016) (citing 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4425 (2d ed. 2002)). It is not enough that a party wishes to reargue the law – there must be an independent change. *Id.* at 629; *see also Rose Acre Farms, Inc. v. United States*, 559 F.3d 1260, 1278 (Fed. Cir. 2009) (intervening law exception applied where prior opinion had "clearly applied the [old] test"); *Litton Sys., Inc. v. Honeywell, Inc.*, 238 F.3d 1376, 1380 (Fed. Cir. 2001) (holding that intervening law exception to law of the case applied where previous opinion had followed approach

expressly repudiated by intervening en banc decision).

The applicable legal context has not changed. Herrera's assertion that *Mille Lacs* "thoroughly repudiated" *Race Horse* is false. *See* Pet. at 18. *Mille Lacs* expressly validated the alternative holding of *Race Horse*: that Congress did not intend the language "the right to hunt on the unoccupied lands of the United States" to survive Wyoming's statehood. *Mille Lacs*, 526 U.S. at 206. And although *Mille Lacs* rejected the application of the equal footing doctrine to terminate treaty rights by *implication* at statehood, it noted that this Court previously had rejected the equal footing doctrine to terminate Indian treaty rights dating back to 1905. *Id.* at 226 n.7 (citing *Winans*, 198 U.S. 371). So, when the *Mille Lacs* Court determined that the equal footing doctrine could not terminate treaty rights by implication upon statehood, nothing changed in the law.

As the state district court correctly noted, *Mille Lacs* did not change the fundamental legal principles applicable to the interpretation of treaties, because *Mille Lacs* reaffirmed that when a court interprets a treaty, the proper inquiry is whether the rights were intended to be perpetual, or whether they were intended to expire upon the happening of an event. Pet. App. 21-24. *Mille Lacs* clarified that the focus of the *Race Horse* inquiry is whether Congress intended the rights to survive statehood. Pet. App. 23. That approach is consistent with the alternative holding in *Race Horse* and consistent with *Repsis*. In fact, the

Repsis court examined the equal footing doctrine and acknowledged that the United States could create a right in a territory later enforceable against a state. *Repsis*, 73 F.3d at 991 (citing *Winans*, 198 U.S. at 381-82). *Repsis* noted the proper inquiry is whether the treaty right was intended at its formation to be continuing or perpetual. *Id.*

In *Mille Lacs*, this Court held that usufructuary treaty rights may not be terminated by implication at statehood under the doctrine of equal footing, but the Court did not announce a new test for treaty interpretation. 526 U.S. at 207-08. And termination by implication at statehood is not what happened in the alternative holding of *Race Horse*, in *Repsis*, or in this case. Rather, the hunting right was interpreted to be temporary and subject to expiration upon the happening of a clearly contemplated event.

Herrera's petition includes numerous statements that Wyoming has asserted that the Treaty with the Crows was "abrogated" by statehood, or that courts such as *Repsis* determined Wyoming's admission to the Union "abrogated" the Treaty. *See, e.g.*, Pet. 10, 14. These statements are inaccurate. None of the courts to address the issue – the courts below or the Tenth Circuit in *Repsis* – determined the Treaty has been abrogated. When a treaty right is temporary and expires according to its own terms, this is the effect of the treaty itself. Wyoming has had no reason to argue abrogation and has not.

Herrera claims that the only clearly contemplated event here is occupation. Pet. 22. Certainly, occupation would terminate the right in the forest, but it is not the only event that could lead to this result. The *Race Horse* Court determined the terminating event was statehood, and *Mille Lacs* affirmed that conclusion. *Race Horse*, 163 U.S. at 515; *Mille Lacs*, 526 U.S. at 206. The basic law of treaty interpretation has not changed and the first element of the collateral estoppel exception is not met.

III. Because the state circuit court determined the Treaty issue as a matter of law, it denied Wyoming the opportunity to create the record this Court demands before interpreting an Indian treaty.

Herrera asks this Court to ignore the dispositive issue of estoppel and decide whether the 1868 Treaty has been abrogated. Pet. 15. Herrera contends this answer will also determine whether a change in the applicable legal context prevents application of collateral estoppel. *Id.* That approach is inherently flawed. Even if this Court accepted Herrera's invitation to interpret the Treaty, the Court lacks the proper record to resolve the issues of treaty interpretation, occupation, or the State's power to regulate for conservation necessity.

When interpreting treaties, this Court "look[s] beyond the written words to the larger context that frames the Treaty, including the history of the treaty,

the negotiations, and the practical construction adopted by the parties." *Mille Lacs*, 526 U.S. at 196 (citations omitted).

With his brief in support of his motion to dismiss before the circuit court, Herrera submitted affidavits. Pet. App. 6-7. As the state district court noted, those affidavits contained inadmissible hearsay, and the State objected to the hearsay they contained. *Id.* 7. Herrera argued that evidentiary hearings were not necessary to determine his motion to dismiss, and he invited the trial court to determine all issues as matters of law. *Id.* The State requested an evidentiary hearing to introduce indicia of occupation in the Bighorn National Forest, to establish that closed seasons were reasonable and necessary to conserve the species, and to aid in the interpretation of Article 4. Pet. App. 6.

The state circuit court did not rule on the admissibility of Herrera's exhibits. As the district court stated, "it is unclear which of the exhibits the circuit court relied on when making its decision, or which of these exhibits, if any, were actually admitted into evidence by the court." Pet. App. 6. The circuit court did not admit any of Herrera's inadmissible hearsay documents into evidence. In any event, the State could not offer its own evidence because the circuit court canceled the evidentiary hearings.[5] Because the circuit

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[5] The district court incorrectly stated that both parties submitted exhibits containing inadmissible hearsay. Pet. App. 7. While Herrera submitted inadmissible hearsay documents, the State merely requested that the court take judicial notice of

court decided these issues as a matter of law, no evidence about the Treaty's history, negotiations, or construction by the parties is before this Court. Thus, even if Herrera could cross the hurdle of collateral estoppel and the *Moser* rule that adjudicated rights are final even if the determination was reached upon an erroneous application of law, this case lacks an adequate record to interpret the Treaty.[6] Remand would be required to develop evidence in the trial court, but, of course, Herrera does not seek such relief in his petition. Because the question presented by Herrera cannot be reviewed by this Court without a developed record, the petition should be denied.

Similarly, the issues of occupation and conservation necessity are not developed in the record. Even if this Court accepts Herrera's invitation to interpret the Treaty before addressing collateral estoppel and determines the right resurrected, this Court would then need to examine whether the Bighorn National Forest is occupied within the meaning of the treaty, and whether Wyoming's closed seasons are necessary to conserve the species. Before any such determination, the State would be entitled to a remand to develop

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certain laws, and attached copies of those laws. The State did not have the opportunity to submit testimonial and other evidence that it intended to offer at the evidentiary hearings.

[6] Herrera cites evidence he claims supports his interpretation of the Treaty. *See, e.g.*, Pet. 22 (referencing R. 250, and claiming the record supports his interpretation of the hunting right). But all of Herrera's record cites are to inadmissible hearsay documents that were not admitted into evidence.

a record regarding indicia of occupation and conservation necessity. *See, e.g.*, *Puyallup Tribe*, 391 U.S. at 398, 401-03 (recognizing tribal fishing "may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians" and remanding the litigation back to state court to determine whether a total ban on Indian net fishing was justified by the interest of conservation). Accordingly, this case is not a clean vehicle to interpret the Treaty and revive a long-expired treaty hunting right.

IV. This Court interprets every treaty with an Indian tribe with attention to both its specific text and its specific historical context, and the court decisions cited by Petitioner reflect different treaties and not a split in authority.

Herrera does not claim that the collateral estoppel ruling that decided this case warrants review or reflects a circuit split. Instead, he asserts that courts "in the Ninth Circuit would reject the proposition that the 1868 Treaty was abrogated because the relevant land was rendered 'occupied' by either the Forest Reserve Act or the creation of the Bighorn National Forest." Pet. 27. But the potential that another circuit *could* reach a different decision does not identify a true split among the circuits. *See* Sup. Ct. R. 10 (contemplating actual as opposed to theoretical conflicts). No other circuit has interpreted the treaty language at issue here.

The only courts to address this precise treaty language are this Court in *Race Horse* and the Tenth Circuit in *Repsis*. Herrera's assertion that a different court in a different circuit might interpret language in a different treaty in a different manner does not identify a circuit split.

Herrera also cites "numerous state courts of last resort" as evidence of a split in authority. Pet. 25-27 (citations omitted). But those courts were interpreting different treaties. Other courts have certainly interpreted other treaties with distinct language differently. In fact, many of the treaties Herrera cites involve treaties negotiated by Governor Stevens, with different language, negotiated with different tribes, at different times in U.S. history. *See id.* at 26-27 (citing various treaties containing language such as "open and unclaimed," rather than the specific language at issue here). The Treaty with the Crows is not a Stevens treaty. Herrera's claim that different state courts have interpreted different treaty language does not create a split in authority warranting this Court's review.

V. The Treaty with the Crows has specific language that is not widely replicated, so the decision below has limited precedential value and does not affect other Indian tribes.

Herrera claims "the issue here affects every other Indian tribe that reserved similar treaty rights." Pet.

29. As discussed above, none of the treaties cited by Herrera – other than the Fort Bridger Treaty in *Race Horse* that this Court has already interpreted – have the same language. As discussed, this Court cannot interpret the hunting provision without a developed factual record. This petition for certiorari asks the Court to review an unpublished decision from a state district court operating as an intermediate court of appeal. Treaties with different language, in other states, are highly unlikely to be affected.

CONCLUSION

The real issue before this Court is collateral estoppel, not treaty interpretation. The state district court properly applied that doctrine and also properly rejected the exception to the doctrine because *Mille Lacs* did not change the applicable legal context. This Court applied the same legal test in *Mille Lacs* as it had in *Race Horse* and as had the Tenth Circuit in *Repsis*. Herrera should not be permitted to collaterally attack the Tenth Circuit's decision in *Repsis*, which has bound the Crow Tribe and its members on the issue for nearly a quarter century, and whose legal basis has not been

undercut during that time. Accordingly, this Court should deny the petition.

Respectfully submitted,

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